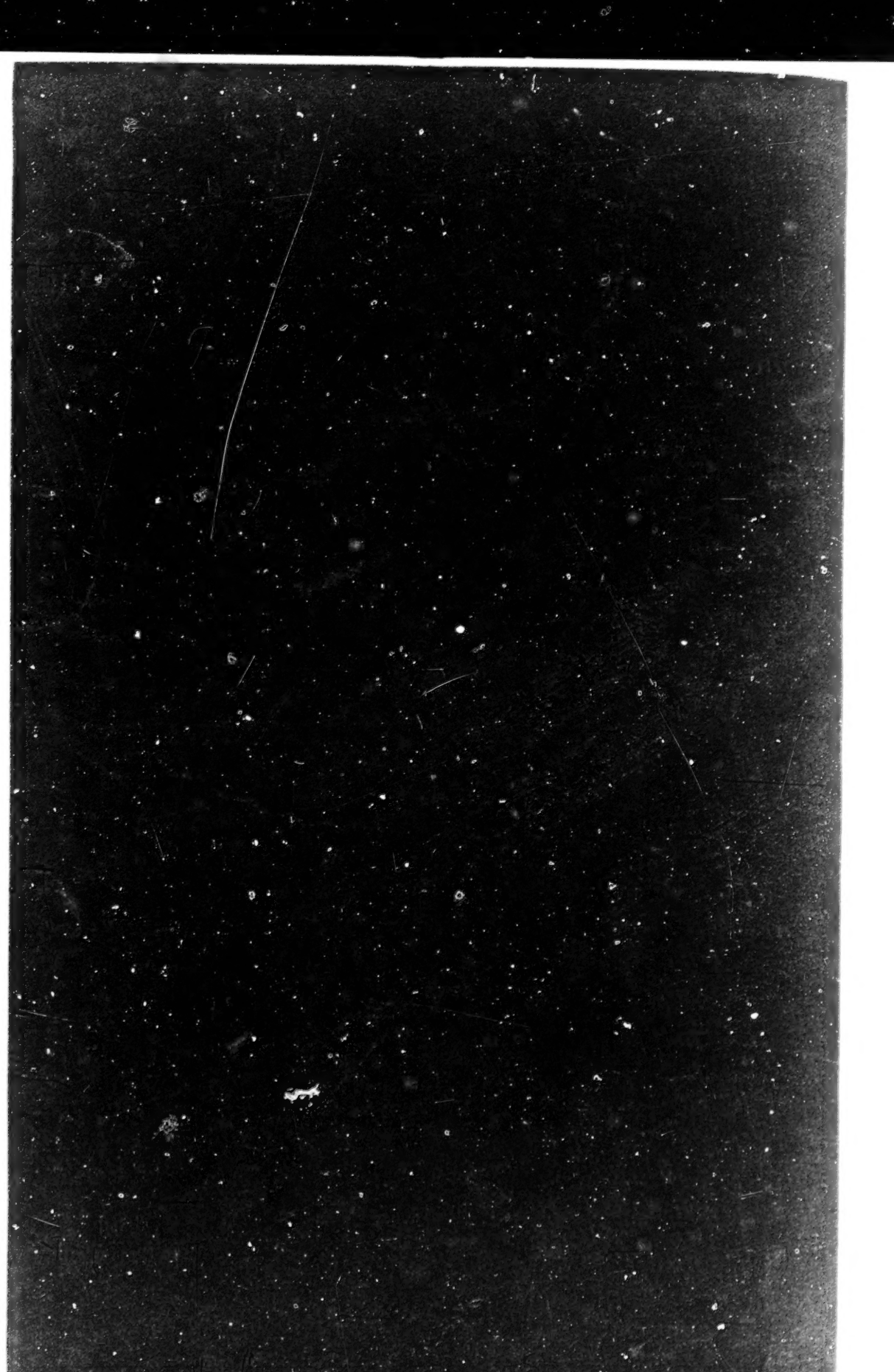

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 70-91

JOSEPH PARISI, *Petitioner*

vs.

MAJOR GENERAL PHILLIP B. DAVIDSON, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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In his prior brief, petitioner maintained that, having exhausted available administrative remedies within the military, [1] he is entitled to judicial review of the Army's denial of his application for conscientious objector discharge, notwithstanding pending military criminal charges against him. This follows, petitioner asserts, because courts martial are not regularly convened nor intended to review such administrative denials, and requiring exhaustion on a selective basis would

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1/ The government's Brief concedes that petitioner has duly complied with the military's administrative requirements for discharge, including, even, application for review by the ABCMR -- which is seemingly requisite only in the Ninth Circuit following the Department of Justice's Memorandum of October 23, 1969 (attached as Appendix C to Respondents' Brief [Resp. Br.] at 61-62).

materially prejudice the rights of those applicants whose claims of conscience are most firmly held. More, petitioner urges that the existence of a purportedly analogous remedy within the military is tenuous, if not wholly illusory.

In its response, the government has asserted that the decision below should be affirmed in order to avoid "needless friction" with the military (Resp. Br. 7-8), and that the military criminal proceedings in fact afford petitioner a viable -- if lengthy -- route to discharge. Resp. Br. 9. With respect, petitioner submits that the former argument fails to come to grips with the competing interests in issue, and that respondents' latter point is refuted not only by the decided cases but

by respondents' own claims -- here and in other proceedings.[2/]

ARGUMENT

I

SINCE EXHAUSTION OF COURT MARTIAL REMEDIES IS NOT SUPPORTED BY THE POLICIES UNDERLYING THE EXHAUSTION REQUIREMENT AND SINCE PETITIONER ASSERTS IN FEDERAL COURT A RIGHT TO DISCHARGE INDEPENDENT OF PENDING MILITARY CRIMINAL PROCEEDINGS, CIVILIAN JUDICIAL REVIEW DOES NOT CREATE UNDUE CONFLICT WITH THE MILITARY.

Relying upon the traditional reluctance of civil courts to

2/ Petitioner is no longer in an incarcerated status, although he is still in the Army. We attach to this Reply Brief, as Appendix "A", a letter from Francis X. Plant to the Honorable Alan Cranston, United States Senator, describing petitioner's present status within the military.

interfere in military affairs (Orloff v. Willoughby, 345 U.S. 83 [1953]), respondents urge that petitioner is required to run the full gamut of criminal trial, appellate and post-conviction 2a/ procedures before being permitted access to a United States District Court to review the Army's administrative denial of his discharge request. Anything less, the Government urges, would create an undue disruption of the military and cause "needless friction" between the autonomous military and civilian judicial systems. Resp. Br. 31. However, as we pointed out in our earlier brief, whether exhaustion is appropriately required in a given case should not be made to turn

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2a/ But compare Resp. Br. at 46 n.44.

simply upon the theoretical availability of a remedy,[3/] but, rather, upon the function served by exhaustion in a given case (McKart v. United States, 395 U.S. 185 [1969]), as well as the burdens inposed upon the claimant by requiring exhaustion, measured against the asserted rights in interest. With respect, we believe that the error of respondents' brief is that it fails tc proceed from a restatement of general principle -- with which petitioner has no quarrel -- to a discussion of the circumstances

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3/ We assume for purposes of this portion of our argument that the military judiciary may, in fact, be capable of providing Parisi with suitable relief at some stage of review of his military conviction. That such remedy in fact exists, however, is by no means clear, a point we discuss at length in text, infra at 31-36.

where exhaustion should fairly end and the right of civil review commence.

As an initial matter, respondents concede a point which is highly significant, if not decisive, to review of the decision below, to wit, that viewed functionally requiring exhaustion in the case at bar cannot be justified on the traditional grounds of "[allowing] the administrative agency 'to make a factual record, or to exercise its discretion or apply its expertise'." Resp. Br. 26-27. See McGee v. United States, 402 U.S. 479, 485 (1971); McKart v. United States, supra. Compare generally, Davis, ADMINISTRATIVE LAW TREATISE, 1970 Supp. at 642-644.

While respondents' concession is commendable for its frankness, the result, we respectfully submit,

is to concede error in the decision below. Under the view urged by respondents, the sole basis for requiring further delay is the hope that the military will at some distant time act to correct prior administrative error as an incident to review of petitioner's criminal conviction. Yet such hope is hardly sufficient to outweigh petitioner's interest in obtaining judicial review of an asserted error of constitutional dimension. Cf., McKart v. United States, supra; United States ex rel Brooks v. Clifford, 412 F.2d 1137, 1141 (4th Cir. 1969).

The rule respondents would have this Court adopt is not only functionally baselsss, but is random and unfairly discriminatory in operation. Respondents do not

suggest, for example, that all applicants for conscientious objector discharge are required to seek review through the military courts prior to bringing civil habeas proceedings. Resp. Br. 24. Rather, the government has previously conceded that a serviceman seeking discharge, at least outside of the Tenth Circuit, is not compelled to commit a military offense and subject himself to military criminal proceedings before being permitted to seek civilian review. See Department of Justice Memo. No. 652, October 23, 1969, attached as Appendix C to Respondents' Brief herein; Hammond v. Lenfest, 398 F.2d 705 (2nd Cir. 1968) but cf., Noyd v. McNamara, 378 F.2d 538 (10th Cir. 1967) and Polsky v. Wetherill,

438 F.2d 132 (10th Cir. 1971) cert. granted and cause remanded, 403 U.S. 916 (1971).

Thus, no court martial exhaustion is required in the many cases where the military chooses to defer or revoke orders to new duty assignments pending resolution of a conscientious objector applicant's habeas corpus petition in the District Court.[4/] Nor is such exhaustion necessary in cases where, although the petitioner

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4/ McGehee v. McKanes, 312 F.Supp. 1372 (D. Md. 1969). (After conscientious objector discharge application denied and habeas corpus petition filed, military consents to court order prohibiting petitioner's removal from jurisdiction pending court determination); Donigian v. Laird, 308 F. Supp. 449 (D. Md. (1969).) (Viet Nam orders revoked pending outcome of habeas corpus petition.)

has committed a military offense, the military chooses not to pursue the charges, at least pending the outcome of the habeas corpus proceeding.[5/] Finally, the government concedes that court martial exhaustion was properly not required in cases like Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968) and Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968) where the military was actively pur-

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5/ Talford v. Seaman, 306 F. Supp. 941 (D. Md. 1969) (Army advises Court that if petitioner is granted relief, it will not pursue court martial proceedings against him); Keil v. Seaman, 314 F. Supp. 816 (D. Md. 1970) (after conscientious objector application denied, petitioner goes AWOL, but military assures court that no further disciplinary proceedings are planned). See also Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968) (applicant jumped ship before filing habeas corpus application; Court's opinion is unclear, but respondents here assert that Navy had declined to prefer court martial charges, Resp. Br. 22 [n.16]).

suing court martial prosecution at the time the habeas petition was filed, but where wrongful denial of the conscientious objector application apparently would not be recognized as a defense to the particular criminal charges because of the nature of the order there in issue, e.g., refusal to put on the military uniform. See Resp. Br. 25-26 (n.20) 6/

In short, the only apparent circumstance in which the government urges exhaustion is where, prior to filing or consideration of the serviceman's habeas corpus petition, the military chooses to give him an order and, upon its refusal, to

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6/ Cf. United States v. Goguen, 421998 (ACMR 9/2/1970)

pursue military criminal charges to which wrongful denial of his conscientious objector application might be recognized as a defense under United States v. Noyd, 18 USCMA 483, 40 CMR 195 (1969). Thus, under the government's position, the availability of judicial review of and relief from military denial of a serviceman's conscientious objector claim will depend to a large extent on military commanders' discretionary decisions to issue particular types of orders and to press court martial proceedings if they are disobeyed.

What is more, the effect of the narrow rule urged by respondents is necessarily to discriminate against those persons whose claims of conscience are most strongly held.

As we pointed out in our opening brief (at 63), had petitioner been willing to compromise his religious beliefs during the pendency of his application before the ABCMR and, thereafter, before the District Court, he would likely been granted discharge from the military. Compare Judge Ely's opinion below (App. 71) and see also Resp. Br. 10. However, because of the strength of petitioner's personal beliefs -- and his unwillingness to compromise them -- he has not only been subjected to harsh criminal sanctions, but has been barred from access to the federal

courts. 7/

7/ The undesirable consequences of adhering to the exhaustion rule suggested by the government are sharply illustrated by the now pending case in the District Court for the Middle District of Tennessee, Joseph L. Johnson vs. Brig. Gen. Wm. Birdsong, et al, No. 6294 . In that case, the petitioner's application for conscientious objector discharge, endorsed by all who personally interviewed him, was denied by the Secretary of the Army. Two days after notification of the Secretary's decision, petitioner's commanding officer ordered him to report to combat training. Petitioner refused the order and was immediately charged with violation of Article 90 of the Uniform Code of Military Justice. Petitioner filed a petition for habeas corpus (See Petition, filed September 1, 1971). The government moved to stay the habeas corpus proceeding because of the pendency of court martial, relying solely on the Ninth Circuit's decision in Parisi v. Davidson, (See respondents' Memorandum filed September 20, 1971). At the hearing, the court stayed the habeas corpus proceedings at least until conclusion of the court martial trial. We are advised that at the court martial trial petitioner's commanding officer testified that when he gave the order, he expected that petitioner would disobey

Finally, the government's apparent suggestion that exhaustion should be required wherever there is the

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7/ (continued) it because of his conscientious objection. As pointed out in petitioner's opening brief, petitioner submits that the power of military officials to issue orders and initiate court martial proceedings against conscientious objector applicants should not be allowed to thwart their rights to invoke the jurisdiction of the Federal Court to test the wrongfulness of the military's denial of their discharge applications.

possibility of military action which would obviate the need for civil intervention, is inconsistent with its prior determination that proceedings before the respective boards for correction of military records need not be had as a condition of civil habeas corpus review. In a Memorandum (No. 652) of October 23, 1969, the Department of Justice announced that while application to the Army and Air Force Correction Boards would thereafter "remain an available procedure", such application would not "be insisted upon by the Government as a precondition for judicial review." See Resp. Br. 16-17 stating that exhaustion should be required so long as "appropriate

channels for review remain open within the armed services." And see also United States ex rel Brooks v. Clifford, supra, with Craycroft v. Ferrall, 408 F.2d 587 (9th Cir. 1969) vacated and remanded 397 U.S. 335 (1970).

While petitioner concurs with the position taken by the Department of Justice (and the Fourth Circuit in Brooks), the present point is simply that there is an undeniably stronger basis for requiring application to the respective correction boards than for the purported "remedy" in issue here. Unlike courts martial, review before correction boards was at least required of all discharge applicants in a given branch of the service, the

"average" time involved in seeking review was approximately four months (U.S. ex rel Brooks v. Clifford, supra, at 1141); the Boards sit as administrative, as opposed to criminal, review bodies, and there is concededly no question as to the availability of discharge relief. If, in such circumstances, the government has concluded (rightly, we believe) that requiring exhaustion before these boards is not mandated by the need to reduce "friction" between civil and military authorities, it should follow perforce, we would assume, that the decidedly more random and

attenuated remedy of court martial "exhaustion" is also not required.[8/]

Notwithstanding these considerations, the government repeatedly asserts that to allow Federal Court review in these circumstances would cause a "collapse of military discipline." (Resp. Br. 17, 31, 49-50). Petitioner, it is said, has "willfully elected" to

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8/ Perhaps the ultimate inconsistency in the government's argument is its concession that if petitioner is acquitted by the Court of Military Review, he would not be required to request from the Court of Military Appeals a Writ of Habeas Corpus discharging him from the Army but could then gain access to the District Court. Resp. Br. 46 (n.44). Thus, the effect of the government's argument is that petitioner must exhaust all military judicial procedures except the one procedure which the government asserts might provide petitioner the discharge relief which he seeks in the Federal District Court.

"defy" military authority and has "only himself to blame" for his predicament. (Resp. Br. 8, 10, 29, 31, 50).

But this rhetoric cannot survive careful analysis. The implicit suggestion that petitioner's action is a morally reprehensible act of defiance ignores the recognition that the true conscientious objector's disobediance to military orders is not "voluntary" but is based on the dictates of religious conscience, "an obligation superior to that due the State." (See U.S. v. Seeger, 380 U.S. 163 at 172. See also 38 U.S.C. §3103 quoted in petitioner's opening brief at 66). It is also inconsistent with the Government's own concession that if petitioner's discharge application was denied without basis in fact and

he is thus entitled to discharge as a conscientious objector, the order he is charged with violating is in fact unlawful.[9/] (See, e.g., Resp. Br. 35-36 [n.34]. But in all events, the question is not whether petitioner's action is to be condoned, but whether it should be punished by forfeiture or suspension of his right to civil relief from wrongful administrative action.

The speciousness of the government's argument is underscored by the obvious fact that District Court review will not in any way interfere with the military's right

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9/ In view of respondent's censure of "petitioner's wilful disobedience of a lawful order", (Resp. Br. 29) it is also appropriate to note that the military has itself acted unlawfully if it has denied petitioner's discharge application without any factual basis.

to "discipline" the type of applicant least deserving of protection -- i.e., the serviceman whose discharge application the court finds to have been properly rejected. On the other hand, in the case of the true conscientious objector whose application has been wrongfully denied, the only "interference" caused by prompt judicial review will be the Court's determination and enforcement of his independent right to be discharged as a conscientious objector.[10/] We respectfully submit that this does not constitute undue interference with military authority, particularly when weighed against the vital

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10/ See, e.g., Weber v. Inacker, 317 F. Supp. 651 (E.D. Pa. 1970); Heath v. Drew, 316 F. Supp. 537 (E.D. Pa. 1970).

interests of liberty, of the conscience and respect for religious beliefs which will be served by permitting prompt review in the Federal courts.11/

11/ Moreover, the suggestion that requiring the conscientious objector to exhuast court martial proceedings is necessary to avoid disruption of military discipline is further weakened by the fact that in many instances the military itself has chosen to defer orders or court martial proceedings pending habeas corpus review (See cases cited at pages 9-10 , supra), and also by the government's concession that exhaustion should not be required when the pending court martial proceedings would not recognize denial of conscientious objection as a defense (See Resp. Br. 25-26 (n.20).

Likewise the argument that Parisi "has only himself to blame" overlooks the fact that the pendency of Court martial proceeding resulted not only from Parisi's refusal to obey, but from the Army's denial of his discharge application (without any basis in fact Petitioner contends) and from military commanders' decisions to insist on ordering him to Viet Nam and to press criminal charges against him.

The unsoundness of the government's position is further illustrated by the basic distinction between this case and the principle of cases such as Gusik v. Schilder, 340 U.S. 128 (1951) and Noyd v. Bond, 395 U.S. 683 (1969) on which the government relies. The court in Gusik made clear that its requirement of exhaustion was applicable to "the collateral attack of military judgments . . .." (See Resp. Br. 14-15). Here, however, petitioner does not ask the Federal Courts for collateral attack upon, or appellate review of, the military prosecution against him. Instead, having fully pursued the administrative process, he invokes the jurisdiction of the Federal Court to recognize his independent

right to discharge as a conscientious objector if the military denial of his application was without basis and fact and hence a deprivation of his constitutional right of due process.

II

APPROPRIATE RELIEF IS NOT AVAILABLE TO PETITIONER THROUGH THE MILITARY JUDICIARY

Our discussion has thus far assumed arguendo that the military judiciary could, at some point, grant petitioner the relief he seeks in his pending habeas corpus action. However, the government has not only failed to substantiate that contention, but it is directly contrary to claims made in their brief before this Court and before the Court of Military Review on

appeal from Parisi's court martial conviction.

As we demonstrate hereafter, the military courts are incapable of granting petitioner discharge or, in all events, could do so only after such lengthy preliminary procedures that the theoretical availability of discharge is rendered largely meaningless. In such circumstances, this Court should well recall its caution in Noyd v. Bond, that a party is not properly "required to exhaust a remedy which may not exist." (395 U.S. at 698 [n.11]).

1. Availability of Discharge. Apart from the adequacy of the remedy which petitioner could obtain through the military judiciary, there is a substantial question concerning the availability of a

remedy in the first instance.[12/] Respondents' brief here strenuously asserts that at least following final appellate review of petitioner's criminal conviction, he may seek discharge through habeas corpus in the Court of Military Appeals under the so-called All Writs Act, 28 U.S.C. §1651(a). Compare Resp. Br. 42-45. Yet while

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12/ As an initial matter, in terms of what constitutes an appropriate "remedy" here, the issue is not simply petitioner's right to place his conscientious objection in issue as a defense at his court martial, but the reasonable availability of discharge from the military as a conscientious objector, without resort to federal district court. Such discharge is, after all, the principle remedy sought in the pending habeas corpus action out of which this proceeding arises.

the government "assumes" (Resp. Br. 45) the existence of such right, it freely concedes that the All Writs Act has never, in fact, been so utilized. 13/

Moreover, notwithstanding the

13/ Apart from the purported availability of discharge through collateral proceedings under 28 U.S.C. §1651(a), respondents' brief suggests -- quoting Judge Darden's separate opinion in United States v. Stewart, 20 USCMA 272, 43 CMR 112 (1971) -- that if petitioner's defense (under United States v. Noyd, supra) of wrongful denial of his discharge application were upheld by the military judiciary, "the Secretary would have no practical alternative except to discharge" him. (Resp. Br. 41).

In terms of the availability of appropriate remedies, however, the government does not suggest what recourse is open to a serviceman in the event the Secretary, generally or in a given case, does not act to discharge him.

Equally, the quoted portion of Judge Darden's opinion in Stewart does not -- if read in context -- support the proposition for which it is cited by respondents. The quotation appears

government's position before this Court, its brief filed in the Court of Military Review on appeal

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13/ (continued) in the following paragraph:

> "If in a collateral way a court martial can declare an order is illegal because under the discretionary regulation a secretary has denied an application for discharge, the secretary would have no practical alternative except to discharge the member. A member of the armed forces who could with impunity refuse any orders is more than useless. Such a procedure would transfer the authority to decide who should be discharged from the military department to a court that is without legislative authority to decide such questions. This would clearly conflict with the statutory grant of authority to administer the armed forces.

Indeed, the thrust of Judge Darden's opinion is that the military cannot tolerate "a procedure [which] would transfer the authority to decide who should be discharged from a military department to a court . . ." Far from supporting

from Parisi's court martial conviction

13/ (continued) the government's position here, Judge Darden would totally repudiate the decision in United States v. Noyd, supra. Compare the separate opinion of Chief Judge Quinn in United States v. Stewart, supra.

Nor is the government aided by the suggestion that if the serviceman were acquitted of the military charges on the ground of conscientious objection, he could be discharged under the authority of Army Regulation 635-200. (Resp. Br. 41, 44 (n.42). As made clear by this regulation (quoted at Resp. Br. 58), its discharge procedure applies only "upon the final judicial determination of a convening authority of a general or special court martial, a law officer, a president of a special court-martial or military appellate agency, that an individual is not currently a member of the Army." (emphasis added). If a determination that a serviceman's conscientious objection discharge application has been wrongfully denied constitutes a determination that he is "not currently a member of the Army" -- or "lack of jurisdiction" as the government also calls it (Resp. Br. 44 [n.42], then an additional reason for not requiring exhaustion would be found in the principle (also conceded by the Government) that exhaustion has never been required where persons "contest the underlying jurisdiction of the military . . . .." (Resp. Br. 16 [n.9] and 29 [n.25]).

takes a contrary view:

> [Parisi] requests this Court to order that he be granted an honorable discharge. However such an action is not within this Court's jurisdiction under 28 U.S.C. §1651(a) since the action is an administrative one and not an integral part of the proceedings of a court martial. Therefore, it is not a proper subject of this Court's powers." [citations omitted] (emphasis added). 14/

2. Adequacy of Military Judicial Remedy. Increasingly, courts confronted with "exhaustion of remedies" claims have regarded not simply the theoretical existence of the asserted remedy,

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14/ Government's Reply to Assignment of Errors, United States v. Parisi, U.S.A.C.M.R. No. CM 42362, at page 16.

Apart from the unavailability of discharge, the right to assert denial of conscientious objector discharge as a defense to military criminal charges is extremely tenuous. It has been hedged about with numerous exceptions, e.g., for particular types of orders and offenses (See Resp. Br. 35-38 and cases there cited), and its viability in any

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14/ (continued) circumstances has been questioned (Lee v. Pearson, 18 USCMA 545, 40 CMR 257 (1969); United States v. Stewart, 20 USCMA 272, 43 CMR 112 (1971), even by the government's brief on Parisi's military appeal which states: "Initially the government submits that, while in the military, a service member cannot within punity refuse to obey an order because he feels that the Secretary has abused his discretion in denying his application for a discharge. United States v. Stewart, 20 USCMA 272, 43 CMR 112 (1970) . . .." (Br. 2-3).

Moreover, assuming the defense is available in limited circumstances, the military court's review of discharge denial appears considerably more restrictive than judicial review on habeas corpus. Compare United States v. Goguen, supra (court "restricted to reviewing only the application file") and Parisi's court martial trial (court refused motion for production of minutes of conscientious objector board decision denying Parisi's application) with Zemke v. Larsen, 434 F.2d 1281 (9th Cir. 1970) (court reviewed notes of board members to ascertain basis of their decision) and Gann v. Wilson, supra (court considered factual affidavits relating to whether matters in the application furnished rational basis in fact for denial).

but its practical availability -- including particularly when the remedy may be pursued and the length of time required in obtaining review. See, e.g., Note, Judicial Acceleration of the Administrative Process: The Right to Relief from Protracted Proceedings, 72 YALE L.J. 574 (1963); Davis, ADMINISTRATIVE LAW TREATISE

Such concerns are of the greatest significance where important personal liberties are at stake. Compare, e.g., U.S. ex rel Brooks v. Clifford, supra, 412 F.2d at 1141. Notwithstanding this concern for the "timeliness" of asserted remedies, respondents' brief flatly asserts that petitioner's right to seek discharge under the All Writs Act (if such right there be) is adequate notwithstanding the admitted

fact that such jurisdiction may be invoked only after the court martial proceedings have run their entire course at the trial and the appellate levels. See Resp. Br. 23 (n.17) and 45 (n.43 and text accompanying).

There can be no dispute that such procedures would take months, if not years, to complete.[15/] And,

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15 / Petitioner's case in the military courts is now under submission before the Court of Military Review, the intermediate appellate court within the military judicial structure. On September 17, 1971, Captain Richard A. Cooper, of the Defense Appellate Division of the Judge Advocate General's Corps, wrote to counsel for petitioner stating that a decision could be expedited within two to four months (See Appendix B, page 44, infra). Petitioner was jailed and charges were preferred in January 1970. His court martial trial was held in April 1970. Even without his requests for enlargements of time to file his brief in the military appeal, it is apparent from an

although the government may see no

15/ (continued) examination of military cases cited by respondents that a one year delay between trial and decision by the military's intermediate appellate court is not unusual. E.g., United States v. Avila, 41 CMR 654 (eleven months); United States v. May, 41 CMR 663 (twelve months); United States v. Quirk, 39 CMR 528 (eleven months); United States v. Goguen, supra, (twelve months - See Appendix D to respondents' brief).

Following a ruling by the Court of Military Review, the decision below would require appeal to the Court of Military Appeals, and seeking relief by extraordinary writ from that court.

pertinent in such delay, we find it frankly difficult to view such an attenuated procedure as presenting a viable "remedy" within the contemplation of traditional exhaustion principles. Indeed, while it is an admitted cliche, given the circumstances of petitioner here (and of numerous others situated similarly) the notion that "justice delayed is justice denied" has undeniable pertinence.

III

A RECENT NINTH CIRCUIT DECISION APPEARS CONTRARY TO THE DECISION BELOW AND SUPPORTS PETITIONER'S POSITION BEFORE THIS COURT.

Petitioner's counsel have just received a copy of the decision of the United States Court of Appeals for the Ninth Circuit in Bratcher v. MacNamara, (No. 22865,

Slip Opinion September 8, 1971).[16/]

In Bratcher, petitioner's habeas corpus action seeking discharge as a conscientious objector was filed in the District Court while a court martial was pending on charges that petitioner -- prior to submitting his discharge application -- had been absent without leave and had defied orders to cut weeds growing behind the post hospital buildings. The district court denied relief on the ground, inter alia, that habeas corpus was inappropriate in view of the pending court martial.

On appeal, the Ninth Circuit

16/ The Ninth Circuit's prior opinion in the case is reported as Bratcher v. MacNamera, 415 F.2d 760 remanded sub nom Bratcher v. Laird, 397 U.S. 246 (1970).

has now reversed the district court on this point.[17] Noting that "habeas corpus is the accepted vehicle for testing legality of retention [custody] of servicemen in the military," the court held:

> "In view of the evolution in the law, we are constrained to hold that it was error for the trial court to dismiss the complaint on the ground that the pending court martial ousted the court of jurisdiction or militated against the granting of any relief."

Without explanation, the court did not cite its prior opinion in Parisi nor did it in any way suggest that exhaustion of court martial

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17/ The district court's alternative determination on the merits (i.e., that there was a basis in fact for the Army's denial) was affirmed.

remedies was a precondition to habeas corpus review of Bratcher's claims on the merits.[18/]

Although respondents would apparently distinguish Bratcher

18/ Citing Glazier v. Hackel, 440 F.2d 592 (9th Cir. 1971) ("Habeas corpus is the accepted vehicle for judicial review of a military department's administrative denial of a serviceman's application for classification as a conscientious objector . . ."), Bratcher also rejected the District Court's view that habeas corpus is unavailable where a favorable decision on the petition would not result in discharge of petitioner from custody. However, the court did not attempt to pass upon whether a favorable decision would or would not have that effect in the circumstances of the then-pending case. Compare Goguen v. Clifford, 304 F. Supp. 958 (D. N.Y. 1969).

because of the nature or timing of the orders there involved (compare Resp. Br. 35-36), it is difficult to see how prompt civilian review should be available to a serviceman who goes AWOL and disobeys an order to cut weeds before even filing an application for discharge, but denied to one who conscientiously refuses orders to Viet Nam after his discharge application has been fully processed and denied. In short, we submit that the Ninth Circuit's holding in Bratcher only underscores the error of the decision below in these proceedings.

CONCLUSION

For the reasons set forth above and in his prior brief, petitioner

respectfully requests this Court to reverse the decision of the Ninth Circuit Court of Appeals and to remand this action for proceedings on the merits.

Dated at San Francisco, California, this 12th day of October, 1971.

Respectfully submitted,

GEORGE A. BLACKSTONE
RICHARD L. GOFF
STEPHEN V. BOMSE
DOUGLAS M. SCHWAB

APPENDIX A

UNITED STATES SENATE
Committee On
Labor and Public Welfare
Washington, D.C.
20510

August 2, 1971

Mr. Richard L. Goff
44 Montgomery Street
San Francisco, California 94104

Dear Mr. Goff:

Enclosed is the official response to my inquiry in your behalf. I hope that this reply will be useful and informative.

If I can be of any further assistance, please do not hesitate to let me know.

With best wishes,

Sincerely,

/s/ Alan Cranston

Enclosure

APPENDIX A

16 Jul 1971

Honorable Alan Cranston

United States Senate

Dear Senator Cranston:

This is in response to your communication of July 7, 1971 relative Joseph Parisi, SSN 048-34-0718.

Please be advised that Mr. Parisi's case was considered by the Army and Air Force Clemency and Parole Board on 29 June 1971. The approved action was to remit the unexecuted portion of his sentence to confinement. Release under parole supervision was not considered necessary. Mr. Parisi was released from confinement on 8 July 1971. He was placed in an excess leave status inasmuch as the appellate review of his case has not been completed.

I hope that this information will be sufficient for your needs. In accordance with your request, the inclosures forwarded with your letter are being returned herewith.

Sincerely,

signed

Francis X. Plant
Special Assistant

Incl:
a/s

APPENDIX B

JAGVI 17 September 1971
Re: United States v. Parisi,
CM 423632

Douglas M. Schwab, Esq.
Heller, Ehrman, White & McAuliffe
44 Montgomery Street
San Francisco, California 94104

Dear Mr. Schwab:

Pursuant to my telephone conversation with your secretary on 16 September 1971, I am forwarding herewith copies of all pleadings filed with the Army Court of Military Review in the above-entitled case. The enclosed are photo copies of our records and not authenticated copies of the original documents which are filed with the Clerk of the Court.

As I indicated to your secretary, Mr. Jeffrey Steinborn, Parisi's civilian counsel has submitted the case on his brief. A decision of the Court can be expected in a 2-4 months.

APPENDIX B

I hope this information will be of value to you.

Sincerely yours,

Richard A. Cooper
Captain, JAGC
Appellate Defense Attorney
Defense Appellate Division

Incl
1. Notice of Appearance
2. Defense enlargements (8)
3. Government enlargements (2)
4. Attorney of Record Designation
5. Assignmentof Errors & Brief
6. Reply to Assignment of Errors

CERTIFICATE OF SERVICE BY MAIL

SUPREME COURT OF THE)
) NO. 70-91
UNITED STATES)

The undersigned hereby certifies that three copies of the foregoing Reply Brief of Petitioner were mailed today to the Solicitor General, Department of Justice, Washington, D. C. 20530, as attorneys for the respondents in this cause.

Dated: October 12, 1971.

DOUGLAS M. SCHWAB